No. 322

IN THE

Supreme Court of the United States

October Term, 1941

PETE LUBETICH, doing business as PACIFIC REFRIGERATED MOTOR LINE,

Appellant,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief for the Appellant

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Brief for the Appellant

OPINIONS BELOW

The opinion of the specially constituted District Court is reported in 39 Fed. Supp. 780. (R. 36.) Its findings of fact and conclusions of law appear at R. 40-

43. The report of the Interstate Commerce Commission[1] appears in 24 M.C.C. 141, 147. (R. 7-24.) Supplemental orders of the Commission postponing, and thereafter, making the instant order effective are shown at R. 25-28.

JURISDICTION

The final decree of the District Court was entered July 8, 1941. (R. 43.) The petition for appeal was filed and allowed July 9, 1941. (R. 46.) Probable jurisdiction was noted by this Court October 13, 1941. The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, 39 Stat. 208, 28 U. S. C., Secs. 47 and 47(a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, (43 Stat. 936, 28 U. S. C., Sec. 345); and by the Motor Carrier Act of 1935, Section 205 (h) (49 Stat. 543, 49 U. S. C., Section 305 (h)).

QUESTION PRESENTED

1. Whether appellant, on the facts found and reported by the Commission in its decision,[2] was entitled to a *certificate* as a common carrier by motor vehicle,

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[1] Hereinafter termed the Commission. Italics ours in each instance unless otherwise shown.

[2] Appellant admits, for the purpose of this proceeding, the correctness of the Commission's statement of the facts contained in its report. 39 Fed. Supp. 780-781 (R. 36, 42).

or in the alternative, to a *permit* as a contract carrier by motor vehicle under the "grandfather" clause provisions of Part II of the Interstate Commerce Act.

STATUTE INVOLVED

The statute involved is Part II of the Interstate Commerce Act, otherwise known as the Motor Carrier Act, 1935, as amended, 49 Stat. 543, 49 U. S. C., Supp. I, §§ 301-327. Pertinent provisions of the statute are set forth hereinafter, together with notes showing subsequent amendment by the Transportation Act of 1940.

STATEMENT

Appellant has operated since March 15, 1935, as a motor carrier of general commodities over various regular and irregular highway routes between Washington, Oregon, and California. (R. 14.) As such he is subject to regulation by the Commission.

The Motor Carrier Act, 1935, as amended, conferred jurisdiction over motor vehicle operations in interstate commerce. Section 203(a) (14), (15) and (18) define, respectively, a "common carrier by motor vehicle", a "contract carrier by motor vehicle", and a

"broker". Section 206(a) and 209(a) provide in substance that no person shall operate as a common carrier, or as a contract carrier, respectively, unless he has a certificate or a permit to perform such operations. Both sections contain a so-called "grandfather" clause, providing in substance that if (1) the carrier was in *bona fide* operation on the statutory date (of June 1, 1935, for common carriers and July 1, 1935, for contract carriers); and if (2) the application was made within the statutory period of 120 days, (i.e., prior to February 12, 1936); and if (3) he has so continued to operate; then a certificate, or a permit, shall be issued without further proof.

The Commission has found that appellant satisfied all the legal requirements:

1. He began operations on March 15, 1935, i. e., prior to the statutory date. (R. 14.)

2. He filed his application on February 5, 1936, under the "grandfather" clause of the act on the proper Commission form (Form BMC 1, R. 30) seeking authority to continue operations *in the alternative* as a *common* or *contract* carrier by motor vehicle of general commodities. (R. 14.)

3. On October 16, 1937, the Commission issued an order finding that appellant had made appropriate application, was in bona fide operation on June 1, 1935, and had continuously operated since that time, and authorizing him to receive a *certificate* as a *common carrier* to operate over a regular route between Seattle and Los Angeles, in the

transportation of general commodities, and to serve designated intermediate and off-route points. (R. 26-7.) On November 13, 1937, this order was stayed "pending the further action of the Commission". (R. 27-8.)

Thereafter, nearly a year later on September 29-30, 1938, the Commission held a formal hearing through one of its joint boards. (R. 30.) Nearly one more year elapsed before the Joint Board issued its proposed report on August 25, 1939. (R. 30.) And nearly a third year elapsed before the Commission rendered its instant decision on July 2, 1940. (R. 7.)

That final order of Division 5 of the Commission by a two to one vote (Commissioner Lee, dissenting) denied to appellant a "grandfather" clause certificate or permit as a common or contract carrier upon the *sole* theory[3] that he was a so-called "owner-operator." (R. 18.) The legal error of this decision is the basis of appellant's attack upon the validity of the Commission's order.[4]

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[3] The Commission expressly rejected two other contentions of protestants concerning (a) an alleged interruption, and (b) an alleged lack of *bona fides*, on the ground that "determination of * * * (these) question(s) is rendered unnecessary by our subsequent conclusion herein." (R. 15-16.)

[4] Appellant exhausted his administrative remedies before filing this complaint by seeking the Commission's reconsideration of its decision. (R. 3, "VI"; R. 32 "IV", "V"; R. 33, "2".)

SPECIFICATION OF ERRORS TO BE URGED

Appellant intends to urge assignments of error numbered 1, 2, 3, 4, 5 and 9. (R. 44-6, 52.) He acknowledges that assignments of error numbered 6, 7 and 8 are now probably rendered moot by a subsequent decision of the Commission in appellant's then pending public convenience and necessity (BMC 8) application (R. 37), decided after the filing of the instant complaint and decision of the lower court, and which granted certain limited rights to appellant as a motor carrier. *Pete Lubetich, Extension of Operations* (mimeographed) decided July 8, 1941. —MCC—.

However, the specific assignments of error present one basic question:

Did the Commission err, as a matter of law, in denying to appellant a *certificate as a common carrier, or* in the alternative, *a permit as a contract carrier,* on the theory that the services which he was performing were "not the fulfillment of engagements in consequence of a holding out to the general public, but primarily was the hauling of traffic for motor common carriers." (R. 18.)

SUMMARY OF ARGUMENT

Appellant contends in the following argument:

1. The Commission's order is contrary to law and void in that it denies to appellant appropriate author-

ization to continue his motor carrier operations upon the erroneous theory that because he was an "owner-operator" he therefore had ceased to be a common or contract carrier.

2. The District Court therefore erred in narrowly construing the complaint to justify dismissal of the application on the theory that the "pleadings only asked that the Commission's order be * * * set aside 'insofar as same requires plaintiff to cease his operations as a common carrier * * *' ".[5] (R. 38.)

3. The granting of rights as prayed conforms to Congressional intent and will not cause administrative difficulty.

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[5] In the final prayer of his complaint before the District Court, appellant sought "such other and further relief as the nature of the case shall require and to this Court shall seem meet." (R. 6) In *Lockhart v. Leeds* (1904), 195 U.S. 427, 436, 25 Sup. Ct. 76, 79, this Court held that a: "* * * prayer for general relief" at the end of the complaint "upon a somewhat different theory from that which is advanced under one of the special prayers" is sufficient grounds for sustaining the complaint; cited with approval after adoption of the new Rules of Civil Procedure in *Liquid Carbonic Corporation v. Goodyear Tire & Rubber Company* (1941) 38 Fed. Supp. 520, 525; Rule 54(c).

The reason that a "somewhat different theory" is advanced, pursuant to the general prayer is that at the time of filing the complaint, January 8, 1941 (R. 1), the decision of the specially constituted District Court in *Rosenblum Truck Line v. U. S.* (1941), which advances a somewhat different theory, had not been rendered. This case reported in 36 Fed. Supp. 467 was not decided until January 14, 1941, and not publicly available until circulation of the advance sheets some months later.

ARGUMENT

I. The Commission's Order is Contrary to Law and Void in That It Denies to Appellant Appropriate Authorization to Continue His Motor Carrier Operations Upon the Erroneous Theory That Because He Was an "Owner-Operator" He Therefore Had Ceased to Be a Common or Contract Carrier.

A.

Appellant is entitled as of right and not of discretion, under the Motor Carrier Act to a certificate as a common carrier, or, in the alternative, to a permit as a contract carrier. He complied with all requirements of law necessary to receive such a certificate or permit; and has continuously thereafter so complied. The Commission, by its order of October 16, 1937 (R. 26), made a quasi-judicial determination that his operations were those of a *common carrier,* and that as such he was entitled to a *certificate* to transport general commodities between Seattle and Los Angeles. His lawful obedience to such determination does not thereafter preclude him from receiving the alternative relief which he originally sought, to-wit, a permit as a contract carrier, if under the facts and the law, he is entitled to such alternative relief. This was the theory of the *Rosenblum* case *supra,* Note 5. The fact that he is found to have transported some freight "loaded by others" as a so-called "owner-operator" does not impair the validity of his claim to a certificate or permit.

While, as we shall show, the Commission itself has taken contrary positions with respect to the status of "owner-operators," the leading authority in support of appellant's contention is the unanimous decision of a specially constituted federal court reversing an order of the Commission for exactly the reasons set forth above. *Rosenblum Truck Lines v. United States,** 36 Fed. Supp. 467. The instant lower court distinguished that case upon the ground that there the complainant sought rights as a contract carrier. This distinction is without merit. The Commission's reports in both the *Lubetich* and *Rosenblum* cases are identical to the extent that both cases recite that applicants sought in the alternative a certificate as a common carrier, or a permit as a contract carrier. 24 M.C.C. 141, 147 (R. 14, 40-43); 24 M.C.C. 121-2.

B.

The distinction between a common carrier and a contract carrier is frequently a tenuous one. *Slagle Contract Carrier Application,* 2 M.C.C. 127. The Commission itself has recognized the difficulty of determining whether a particular applicant is a common or a contract carrier and has expressly encouraged them to seek alternative rights, and has undertaken to deter-

* Now on appeal to this Court, No. 52.

mine the appropriate legal classification. In an early case, *Tucker Contract Carrier Application*, 2 M.C.C. 335, 337-8, the Commission said:

> "While the evidence establishes applicant's right to a *certificate*, his application is for a *permit*. Evidently, he thought that the contract-carrier form of authority more nearly fitted his operation. * * * *In many situations, it is not easy to determine whether a particular operation is a contract-carrier or a common-carrier service. He has filed an application on a form which we furnished him, has attended a hearing set by us, and has submitted his facts.* Under the circumstances, we are of the opinion that *it would be more in harmony with the liberal rules* which we have adopted to govern our procedure, *to grant that form of authority which the evidence shows applicant is entitled to receive, rather than to deny his application*, * * *. We shall, therefore, grant a certificate, but shall direct that its issuance be withheld for 30 days * * * to afford any * * * interested party * * * opportunity to petition for rehearing or reconsideration under our rules. In this way, we can possibly avoid any unnecessary hardship to the applicant and, at the same time, do no violence to rights of others. *Notices of hearings on applications will hereafter contain a statement to the effect that, in such cases, we will award the particular authority which the evidence shows applicants may be entitled to receive, irrespective of the form of the application or the prayer therein.*"

This same doctrine has been followed many times. *Darnell Contract Carrier Application*, 2 M.C.C. 656, 657; *Coast Line Exp. Common Carrier Application*, 9 M.C.C. 427, 430.

The Commission has used the same yardstick for common and contract carriers who were so-called owner-operators. In *Dixie-Ohio Express Company, Common Carrier Application,* 17 M.C.C. 735, 741, it held:

> "* * * *in view of the similarity of the* * * * *definition of a contract carrier* * * * *and* * * * *of a common carrier* * * * it is apparent that *the same rule should be applied in determining the grandfather rights of contract carriers, based upon the use of equipment belonging to others, as is applied in determining similar rights of common carriers.*"

True, that case held that under its particular facts, the applicant did not acquire any motor carrier rights. It will be discussed later, but is significant here as authority for identical construction by the Commission of the definition of common carriers and of contract carriers. So that if the *Rosenblum* case, *supra,* is sound law, then it has equal application whether Lubetich be considered a common carrier or a contract carrier.

C.

In the *Roseblum* case, *supra,* at 468, the Court reviews the salient facts, to determine whether the Commission's decision denying either type of authorization was legally sound. It finds on a review of those facts that the decision was not sound. The Court said:

> "*The complainants,* prior to July 1, 1935, and thereafter, *owned trucks* on which *they paid the*

vehicle license fees, which trucks were used by common carriers to transport freight between St. Louis and Chicago. The shipments went forward in the names of the common carriers, who supervised the loading and unloading of the trucks and collected the charges. *Complainants were paid an amount for each trip, dependent upon the weight of the load carried and the compensation* derived from its carriage. *Complainants carried fire, theft and collision insurance* on their equipment, and while public liability and cargo insurance were taken out in the first instance by the common carriers, the cost of such insurance was *charged to the complainants*. The cargo insurance covered only damage over the sum of $100, and *complainants* agreed with the carriers to be responsible for damage under that sum, and *were* in some instances *compelled to pay* such *losses. The drivers of the trucks were employees of complainants*, who hired, paid and discharged them. *The complainants were free to take any route* they *chose* between the designated points, and there were two or more routes available between the two cities. *The common carriers exercised no control over the routing, except to request on occasions that drivers register* at certain stations along the road. In some instances the complainants had a full load from one common carrier, and at other times they had fractional loads for one, two or more carriers on the same truck on the same trip. At no time were the trucks of complainants in the exclusive service of any common carrier."

These facts are similar to the instant *Lubetich* case, as shown exclusively by the findings of fact in the Commission's own report. (R. 7-24.)

Lubetich commenced operations on March 15, 1935,

over a regular route between Seattle and Los Angeles. (R. 14). *He owned and* ***operated*** *two trucks* (R. 15). *He held permits in his own name from the States of California, Washington, and Oregon* (R. 18). *He paid a monthly fee* to the latter state based upon the total number of miles operated therein (R. 18). *He continually maintained his respective state operating authorities and bore the cost of insurance, operating expenses, etc.* (R. 23.)[1]

Lubetich submitted an exhibit listing shipments ***transported by him*** *beginning on March* 16, 1935, *and extending to the date of the hearing.* (R. 16.) *Lubetich contends that* during the period in controversy — "April, 1937 until January, 1938" (R. 17) *he made some trips in which he did not have freight loaded by Hendricks.* (R. 17.) Between June, 1935 and January, 1938, *most,* if not all, *of the* ***traffic handled by (Lubetich)*** *was transported in (Lubetich's) vehicles only between the terminals of the* ***other*** *carriers* (R. 15). *Taylor* (found by the Commission, R.19, to be at most a broker under § 211 of the Motor Carrier Act) solicited freight from the *general public on behalf of various motor carriers, including Lubetich.* (R.20.)

[1] This sentence is derived from Com. Lee's dissenting opinion. There is, however, no dispute between the majority and minority as to the facts found. The dissent is wholly on the legal result of the facts. (R. 22-3.)

On these findings of fact, we contend the Commission erred in its legal conclusion that appellant had forfeited his rights as a *common*, or, in the alternative, a *contract* carrier.

We believe the correct principle of law was vigorously and succinctly stated by Judge Lee in his dissenting opinion to the Commission's report (R. 22-3):

> "* * * *As to the denial of* claims based on the operations of *Lubetich* and Fornaciari, *I dissent. There is no question but that these men were engaged in transportation by motor vehicle prior to and since the 'grandfather' date. Furnishing transportation was their business.* ***They were real truckers; they sat behind a wheel and not behind a desk. Here they are*** *held to have been neither common nor contract carriers, but are* ***dubbed 'owner-operators' because*** for relatively short periods, long after the effective date of the act, ***they hauled freight 'loaded' by Hendricks and Tri-State.*** The only authority relied upon by the majority is the *B-Line case,* a two-page decision in which the question was not thoroughly explored, and to which I dissented.
>
> *"Even during those periods when they are said to have acted as 'owner-operators,'* ***Lubetich*** and Fornaciari ***continually maintained*** *their respective* ***State operating authorities and*** *themselves bore the cost of* ***insurance, operating expenses, etc.*** *Moreover,* ***Lubetich*** *testifies that during this period he* ***did not confine his operations to traffic secured by Hendricks, but hauled other freight as well. No one contradicts this testimony*** *but the majority's report rejects it wholly because he submitted no documentary evidence in corroboration thereof.*

"Because Hendricks is held to be a common carrier, Lubetich and Fornaciari, who hauled freight *for* Hendricks, are now denied any rights whatever. *I believe that Congress intended that all 'grandfather' carriers for hire should be given operating authority whether they served the general public or confined their operations to hauling freight furnished by a selected shipper or by another carrier.*[*] I think *Lubetich* and *Fornaciari had rights as common or contract carriers by motor vehicle,* and that their respective successors are entitled to corresponding operating authority."[*]

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[*] Compare *Rosenblum Truck Line v. United States*, 36 Fed. Supp. at 470:

"The statute says if they transport freight under special agreements 'directly or by a lease or any other arrangement' for compensation, they are contract carriers. *This language is broad. Congress purposely so provided.* It may be that the administrative process would be simpler *had the statute been made to read otherwise. It might have been better to further limit the number of motor carriers, but this is not for the Court to say. Congress enacted the statute; it means what it says.*

"The conclusion seems inevitable that the common carriers did not have exclusive control of and dominion over the trucks of complainants while they were engaged in the transportation business, and that the conclusion of the Commission to that effect has no substantial basis in the evidence offered.

"The prayer of the complainants will be granted to the extent of setting aside the orders entered."

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[*] Contrary to the contention of counsel for the Government, this dissenting opinion is one upon a question of law, and obviously should be considered by a reviewing tribunal in exactly the same light that it would be were it the dissenting opinion of one of the members of a court. The whole question here is whether the majority or the minority was correct as a matter of law.

D.

It is important now to consider the definition of common and contract carriers as contained in the 1935 Act which created the "grandfather" rights. Section 203(a) provided as follows:

> "(14) The term '*common carrier by motor vehicle' means any person who* or which *undertakes, whether directly or by a lease or any other arrangement, to transport* passengers or *property,* or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, *whether over regular or irregular routes,* including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of Part I.
>
> "(15) The term '*contract carrier by motor vehicle' means any person, not included under paragraph* (14) of this section, *who* or which, *under special and individual* contracts or *agreements, and whether directly or by a lease or any other arrangement, transports* passengers or *property* in interstate or foreign commerce *by motor vehicle for compensation.*"[10] (Italics ours.)

[10] The foregoing definitions were changed by the Transportation Act of 1940. That act was approved September 18, 1940, after the issuance of the instant order on July 2, 1940. The definition as it appears above must obviously be controlling, for it was under that definition that the Commission acted. Moreover, the Congress gave "grandfather" rights to persons defined in the 1935 Act. A change in such a definition has no greater retroactive significance than would a change in a tax statute affect the taxpayer during succeeding years.

Both the 1935 original and the 1940 revised definitions in §203 (a) are indicated in the following, wherein words which have been

Section 203 (a) further provides:

> "(16) The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle."

No change was made in this definition by the Transportation Act of 1940. These two classifications of common and contract carriers have, therefore, continuously remained the only two classifications of public carriers. The next succeeding paragraph, §203 (a) (17) defines a "private carrier" to be one who is not engaged in transportation for compensation.

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eliminated by the amendment are indicated by canceled type and those which have been added are indicated by italics:

"(14) The term 'common carrier by motor vehicle' means any person ~~who or which undertakes, whether directly or by a lease or any other arrangement, to transport~~ *which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of* passengers or property, or any class or classes ~~of property~~ *thereof* ~~for the general public in interstate or foreign commerce by motor vehicle~~ for compensation, whether over regular or irregular routes, ~~including such~~ *except transportation by* motor vehicle ~~operations of carriers by rail or water and of~~ *by an* express ~~or forwarding companies~~ *company* ~~except~~ to the extent that *such transportation has heretofore been* ~~these operations are~~ subject to ~~the provisions of~~ Part I, *to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to Part I.*

"(15) The term 'contract carrier by motor vehicle' means any person ~~not included under paragraph (14) of this section, who or~~ which, under ~~special and~~ individual contracts or agreements, and ~~whether directly or by a lease or any other arrangement, transports~~ *engages in the transportation (other than transportation referred to in paragraph* (14) *and the exceptions therein) by motor vehicle of* passengers or property in interstate or foreign commerce ~~by motor vehicle~~ for compensation."

Nowhere in the Act or in the Committee Reports is there any reference to so-called "owner operators."

There, is however, definite provision for "brokers" of motor transportation.

Section 203 (a) (18) provides:

> "The term 'broker' means any person not included in the term 'motor carrier' and not a bona fide employee or agent of any such carrier, who, or which, as principal or agent, sells or offers for sale any transportation subject to this part, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation."

Section 211 (a) - (d) provides for the issuance of licenses to brokers and the regulation by the Commission of their activities in soliciting and procuring interstate shipments.[11]

The importance of the provision with respect to brokers as bearing upon the question of whether appellant is a motor carrier entitled either to a certificate or a permit was recognized in *Rosenblum v. United States,* supra, at 469, wherein the court held:

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[11] Congress expressly omitted to provide any "grandfather" privileges for such brokers; that is, Section 211 (b) permits them to continue operations until "otherwise ordered by the Commission," but does not give them absolute rights as is the case with common and contract carriers qualifying under the "grandfather clause."

> "In thus recognizing that common and contract carriers need not contract directly with the shipping public, but that such contracts may be made through third persons, such as brokers, *Congress has shown a clear intention that licensing of carriers should not be affected by the fact that dealings were not had directly with shippers.* Nothing in the statute indicates that a carrier must deal directly with the shipper in order to be entitled to a license under the Act."

In *United States v. Maher,* 307 U. S. 148, 155, this Court said:

> "The recognized practices of an industry give life to the dead words of a statute dealing with it."

Here we are confronted with vitalizing these definitions.

In a special report of the Interstate Commerce Commission, dated February 25, 1938, addressed to the Congress, and recommending certain changes in the Act, the Commission on page 1 comments:

> "*** The average (motor carrier) operator is a 'little fellow.' Thousands of them are one-truck or two-truck operators."

In *Acme Fast Freight, Inc., Com. Car. Appn.,* 8 M.C.C. 211, 224, the Commission said:

> "The reports and statements of the proponents of the act, and the congressional proceedings, show that the provisions with respect to *the licensing of 'brokers' were intended to cover deal-*

ings which had grown up because of the nature *of the motor-carrier industry. Such carriers, especially in the trucking field, are in general very small operators, and there are many of them. It is not always easy for shippers* or travelers *to locate the carriers* best able to provide desired service. *Nor can each small carrier afford to employ its own soliciting force. Because of this situation, agencies have arisen which procure the services of motor carriers* for intended customers, *or solicit business* for groups of carriers, *upon a commission basis.* The known methods employed by some of these agencies were such that it was thought desirable that they be brought under a degree of public regulation and the act so provides."

It is an awareness of these facts which "give life to the dead words" of the statute. Not only did the Commission err in "dubbing" Lubetich an "owner-operator," but it further committed a prejudicial and fatal error in holding (R. 18):

> "The record contains certain contradictory evidence having a bearing upon *whether Hendricks was in fact operating as a broker during the period in question* ***. However, (*this*) *question*(*s*) (*is*) *not controlling* in view of the facts discussed above and need not be given further consideration herein."

We submit that most emphatically *this question was controlling.* For, if Hendricks, in his relationships with Lubetich, was a broker[11] then the motor

[11] We do not here challenge the findings of the Commission that *other* activities of Hendricks (and his successors) may justify issuance to him of a certificate as a motor carrier, *Los Angeles - Seattle Motor Freight Inc. Com. Car. Appn.*, 24 M.C.C. 141. (R. 7)

carrier operations performed by Lubetich accrue to support Lubetich's claims under the "grandfather" clause for a certificate or permit. The Commission erred as a matter of law in failing to determine whether Hendricks was such a broker.

E.

In the Commission's determination of the legal question in the Lubetich case, it relied on only one case, *B-Line Motor Freight Common Carrier Application,* 20 M.C.C. 538. That case, as stated by Commissioner Lee was "a two-page decision in which the question was not thoroughly explored." (R. 23.) The facts in that case are entirely different from those in the instant case. However, that two-page case cites *Dixie-Ohio Company Common Carrier Application,* 17 M.C.C. 735. Now that case granted certain rights to an applicant for a common carrier certificate which accrued by virtue of use of equipment leased from others. There, the Commission found (a) the arrangement was contained in written leases of the equipment; (b) the leases "for the most part do not cover special trips"; (c) the lessee paid all necessary taxes involved in the operation and provided all bonds; (d) the leased equipment had the name of the applicant on the vehicle rather than that of the "owner-operator"; (e) the "owner-operators" were not permitted to use the

equipment for any other purposes; (f) the leased equipment was registered under applicant's authority; (g) the time and place of all traffic handled was determined by applicants, and the owner-operators as well as the hired drivers received their instructions from applicant's dispatcher. *None of these facts exist here.*

Moreover, if the Commission was correct in the *Dixie-Ohio* case, in considering one of the essential determinative facts to be the name shown on the equipment, then the Commission committed further fatal error in the instant *Lubetich* case, in finding (R. 18):

> "The record contains certain contradictory evidence, having a bearing upon * * * *whether the name of applicant* or his predecessor *was carried on their* respective pieces of *equipment*. However, (this) question(s) (is) not controlling in view of the facts discussed above, and need not be given further consideration here."

Most assuredly this matter likewise was controlling in proof of appellant's independent operation throughout the entire period. The record supports this contention. The Commission's failure to make an appropriate finding was prejudicial and fatal.

F.

The instant report and order is deficient in these respects for an additional ground, that is, absence of essential quasi-jurisdictional findings, as to the broker

relationship, and the name on the vehicle, both of which are essential to a finding of control. Cf. *Florida v. United States*, 282 U. S. 194, 214-5; and *United States v. Chicago M. St. P. & P. R. Co.*, 294 U. S. 499, 508, 510-511, wherein the court reversed an order of the Interstate Commerce Commission because:

> "In the end, we are left to spell out, to argue, to choose, between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency."

G.

We consider now three other recent Commission cases construing the "owner-operator" problem; and then make final reference to the *Rosenblum* case.

In *Liberty Forwarding and Distributing Company, Common Carrier Application*, 21 M.C.C. 495, the Commission denied to applicant a certificate premised upon the operations of certain so-called "owner-operators" on the theory that the "owner-operators" were themselves entitled to the rights.

In *Interstate Truck Service, Inc., Common Carrier Application*, 21 M.C.C. 645, the Commission distinguished that case from the *Dixie-Ohio* case on the ground that in the *Dixie-Ohio* case there were written leases; that *Dixie-Ohio* assumed the insurance costs, and exercised complete control over the "owner-driv-

ers." Note that in that case the Commission significantly created a different term of "owner-*driver*" rather than "owner-*operator.*" The Commission then concluded that the *Dixie-Ohio* case was not applicable for the following reasons:

> "In the instant case the 'owner-operators' are stated to have been parties to an 'oral lease,' which the evidence indicates was *not a lease* at all, *but* rather *a vague* and variable *arrangement respecting compensation* to be paid the motor vehicle owners. The evidence further indicates that there was no uniformity in the measure of such compensation. There is *no evidence that* on and prior to June 1, 1935, *applicant provided* any public liability or property damage *insurance,* or assumed any liability to the general public with respect to the operation of the vehicles it utilized. Michel did protect himself by an excess cargo insurance policy. While a few of the vehicles utilized in the operation were said to be constantly in the employ of applicant, many other such vehicles were used for a single outbound trip from the Ohio Valley, and the evidence shows that applicant had no knowledge of what operation such vehicles performed after they left the Ohio Valley.
>
> "In the *Dixie-Ohio Express Co.,* case, supra, division 5 concluded that as to the vehicles of others used by that applicant as of June 1, 1935:
>
> 'they were operated under applicant's direction and control and under its responsibility to the general public as well as to the shipper, and that applicant, as to its operations in which such vehicles were employed, was a common carrier by motor vehicle as defined in section 203 (a) (14).'

"No such conclusion is possible here because no such direction and control or responsibility to the general public is shown to have been present on the statutory date in the instant operation. Subsequent assumption of such direct control and responsibility, if it has been accomplished, (a fact not definitely established by this record) is not sufficient to bring this operation within the purview of the findings in the *Dixie-Ohio Express Co.*, case."

In *Schreiber Common Carrier Application*, 26 M.C.C. 723, 727, the Commission said:

"Applicant testified that the owner-operators operated under his entire control at all times and that he was responsible for their actions while en route. However, the record clearly shows that they may haul for any or all who desire their services when not carrying a load for him, and this and other facts of record cast considerable doubt as to the scope and extent of the supervision and control exercised by applicant over the owner-drivers which served him.

"Briefly stated, the so-called lease arrangement between applicant and owner-operators on the 'grandfather' date appears to be nothing more than an arrangement whereby applicant might avail himself of the services of the owner-operators if and when he chose so to do. The return of compensation apparently was not fixed, but varied from time to time, according to the agreement of the parties as to each trip. As hereinbefore stated, the owner-operators were not obligated to serve applicant exclusively and the record is convincing that applicant had nothing to do with their management and conduct other than such general dealings as may be necessary to in-

sure prompt connections and satisfy service. The oral agreement under which these owner-operators served applicant on the statutory date appear to relate almost exclusively to compensation for their services. From the foregoing, it is evident that the control exercised by applicant over the equipment of the owner-operators was strictly limited, and not such as was found in *Dixie-Ohio Exp. Co. Common Carrier Application,* 17 M.C.C. 735.

"On the whole, we are of opinion that * * * until applicant acquired equipment of his own * * *, his activities consisted principally in the solicitation of traffic which was transported by others under an agreement whereby applicant obtained a part of the revenue for such services of solicitation. We are unable to conclude that the vehicles employed in the transportation were operated by applicant under a lease or any other arrangement whereby the operation was performed under the complete direction and control of applicant, with full responsibility to the general public as well as to the shippers. Accordingly, the application must be denied."

It is submitted that these distinctions are of significance here. Nowhere in the instant report and order are there findings sufficient to bring the case within the rules of the *Dixie-Ohio* case, even if it be assumed that that case was rightly decided."

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[19] Nor can these other cases be explained away by the sweeping assertion that *Stare Decisis* has no application. This contention was advanced by the Government's Reply Brief in the lower court. If not the Commission's function, then it is the Court's to give some pattern or rationale to statutory construction, which does vitalize "the dead words of the statute."

To again quote from the *Rosenblum* case, 36 Fed. Supp. 467, 469-70, wherein it concluded that the Commission had erred in denying to Rosenblum a permit on the theory that he was an owner-operator:

> "In *United States v. Brooklyn Eastern Terminal*, 249 U. S. 296, 39 S. Ct. 283, it was *held* that *the Terminal was a carrier*, though not organized or held out as such, and *though it* had not filed tariffs nor undertaken to transport property for all who applied, but *merely carried freight as agent for certain railroads* with which it had made special contracts. See also *United States v. California*, 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567; *Union Stock Yard & Transit Co. v. United States*, 308 U. S. 213, loc. cit. 220, 60 S. Ct. 193, 84 L. Ed. 198. *It was* not the method of fixing charges, nor the parties with which complainants contracted, but *what they did, that characterized their undertaking.*
>
> "*The complainants transported freight in interstate commerce for compensation under agreements with common carriers. They actually engaged in the business of transportation.* In so doing *they provided the trucks and drivers, paid the license fees for using the highways, and assumed the responsibility for loss or damage to freight entrusted to them. This obligation they discharged both by carrying insurance and by payment of losses.* The trucks were not used exclusively by any one common carrier, but by several. Even when called by one carrier, on some occasions the use of the trucks on the particular trip was not limited to the service of that carrier, but the freight of other carriers was transported in the same truck at the same time. *These facts*

sho.: that the control of the equipment was in the hands of complainants and not in the hands of the common carriers.

* * *

"The statute says if they transport freight under special agreements 'directly or by a lease or any other arrangement' for compensation, they are contract carriers. *This language is broad. Congress purposely so provided. It may be that the administrative process would be simpler had the statute been made to read otherwise. It might have been better to further limit the number of motor carriers, but this is not for the Court to say. Congress enacted the statute; it means what it says.*"

H.

This section of the brief may be appropriately concluded with citation of a very recent decision (quoted extensively because not yet officially reported), *J. E. Johnson v. United States and Interstate Commerce Commission* (1941) — Fed. Supp. — 2 Fed. Car. Cases (C.C.H.) Par. 9628, decided by the United States District Court for the District of Oregon, September 22, 1941. That case involved an application for an injunction brought by *plaintiff as* successor, to *the same* Fornaciari, *whose rights were denied* in the same decision of the Commission herein involved. (R. 7, 18). The rights of Fornaciari, like those of appellant, were denied on authority of the *B-Line Motor Freight Common Carrier Application,* 20 M.C.C. 538 (R. 21) which case was aptly described by Commis-

sioner Lee, dissenting, as the "only authority relied upon by the majority" and "a two-page decision in which the question was not thoroughly explored." (R. 23.)

In the *Johnson* case, a three-judge Court was convened composed of Judge Haney, of the Circuit Court of Appeals, who. likewise, had participated in the *Lubetich* case. However, the two federal district judges were from the District of Oregon and had not participated in the Lubetich case.

The District Court sustained the action of the Interstate Commerce Commission by a divided court, Judge Haney writing a brief majority opinion which primarily recites the position of the Commission and concludes that the court is "required to give the administrative construction great weight" and, therefore, sustained the action of the Commission.

District Judge Fee filed a special concurring opinion in which he set forth his view of the law as determined by this Court in *United States v. Maher,* 307 U. S. 148, particularly at 155. He concluded his special concurring opinion as follows:

"* * * The Supreme Court say:

"'Congress responded to the need for regulating motor transportation through familiar administrative devises while at the same time it satisfied

the dictates of fairness by affording sanction for enterprises theretofore established. Whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise contraverted matters of fact.' *United States v. Maher,* 307 U. S. 148, 155.

"The announcement of this doctrine placed all the existing business which Congress sought to preserve in the spirit of fairness beyond the scope of judicial consideration by drawing about such controversies the magic circle of 'question of fact.' It may be pointed out that a consistent policy in determination of questions of fact has in reality the force of a rule of law. [Judge Fee's footnote: Especially when administrative interpretation of the statute is given great weight. See *United States v. American Trucking Ass'ns.* 310 U. S. 534, 549.]

"However, this Court without obvious rationalization cannot fail to recognize the proposition that the Supreme Court has declared that these are questions of fact and not of law, nor the axiom that upon questions of fact the judgment of the Commission is final, no matter how arbitrary the result may seem.

"Solely because a lower Court should not attempt to reverse a policy laid down by the highest tribunal, when the pronouncement is plain, I concur in the result reached by Circuit Judge Haney."

District Judge McCulloch filed a dissenting opinion, which, in our opinion, is so persuasive as to warrant setting it out in full, especially since it is not yet available in the printed advance sheets. However, before doing so we seek to comment briefly on Judge

Fee's opinion, to which reference has been made. The *Maher* case is not sound ground for sustaining the Commission's action here. In that case Maher operated on and after the statutory "grandfather" date as an anywhere-for-hire operator of a large passenger vehicle primarily transporting groups of men employed as loggers and similar groups to various destinations in Oregon and Washington. Sometime later, after the statutory date, he instituted a new daily scheduled motor bus operation over a regular route between Portland, Ore., and Seattle, Wash., although he had only previously operated to Seattle once or twice during several years. *Maher Com. Car. Appn.*, 3 M.C.C. 479-81. We believe the Commission's decision under the grandfather clause in that case was sound, as well as the appeal in this Court.

While we disagree therefore with Judge Fee's analysis of the import of the *Maher* case as requiring denial of the *Johnson* or *Fornaciari* application for injunction, we do agree with the persuasive reasons that he advances which, as a matter of initial impression, would have apparently led him to grant the injunction prayed, but for the constraint which he felt, due to his interpretation of the *Maher* case. In the forepart of his concurring opinion he said:

"The Motor Carrier Act * * * directed (the

Commission) to issue a certificate * * * (under appropriate proof under the 'grandfather' clause) * * * without further proof of public convenience and necessity. In the absence of controlling authority *these basic provisions* relating to existing businesses engaged in interstate transportation by motor carrier seem to *indicate that property rights of the existing carriers were recognized* and confirmed by these clauses of the legislation *and that the power conferred upon the commission* in respect thereto *is judicial,* rather than administrative.

"The Commission have, *however, treated such determinations as* legislative or *administrative* questions *and have by interstitial legislation established distinctions and tests* relating to these property rights *which Congress did not* expressly *authorize.* By so doing, it would seem that *the Commission have actually been influenced by their concept of public necessity and convenience* which the act expressly removes from their consideration with respect to carriers operating on June 1, 1935."

Appellant, in quoting the foregoing language, implies no criticism, direct or indirect, of the Commission. It is honest, able and diligent. But in acquiring jurisdiction, and in regulating, and fostering thousands of motor carriers, the Commission doubtless may have subconsciously been influenced by a feeling that too many carriers with "grandfather" rights would be harmful to the industry. And that is precisely Judge Fee's point. But that is a matter of legislative policy. Congress expressly conferred such rights.

For the future it expressly provided certificates of public convenience and necessity, but as to the past it expressly provided a system that created survival of the fittest. Unhappily, a great many have already failed to survive. Others have grown stronger through mergers, or in competition. It must be remembered that six years have elapsed since the Act was passed. But Congress did expressly create "property rights of the existing carriers" to continue to do in the future what they had done in the past without proof of public convenience and necessity.

One further comment of Judge Fee seems pertinent. In commenting upon the Commission's sincere but overly technical and strained construction of the definition in the Act quoted above, he said:

> "*By drawing distinctions as technical as those of* the *common law* relating to *pleadings or contingent remainders, the Commission* seem thus to *have substituted tests of administrative convenience* established after the immunizing period has passed in place of the test laid down by Congress to satisfy the dictates of fairness.
>
> "*There is no clause of the act which provides that one* who has been transporting goods in interstate commerce on and since June 1, 1935, *must have dealt directly with the shippers and himself issued bills of lading.* But the Commission were apparently influenced by their ideas that public policy required that no more than one 'grandfather' certificate should be issued for a single

operation. This determination seems to wipe out property rights of a small operation which Congress sought to preserve. * * *

"The tendency of the Commission, influenced by such considerations to eliminate the smaller or more irregular operator from the field, the seeming injustice of drawing distinctions by interstitial interpolation to serve administrative convenience, the apparent evil of permitting the Commission to extend the immunizing period for over five years and then to destroy a business existing at the date of the approval of the statute not upon a broad survey of the record of operation as a whole but upon a deviation which did not continue more than four months, the patent injustice of using a test which at the time of the event had not been called to the attention of the carrier by express terms of the governing statute nor foreshadowed by the decisions of the Commission itself are ably pointed out in the dissenting opinion of my colleague, Judge Claude McColloch."

Observing then, the construction of the *Maher* case which constrained Judge Fee to concur in the majority opinion in the presently cited *Johnson* case, we quote now, in substantially full text, the dissenting opinion of District Judge McCulloch:

"Even though it be true, as contended by counsel, that the modern decisions grant the unreviewable right to the Interstate Commerce Commission to interpret and apply the Motor Carrier Act to concrete situations, it does not follow that the Commission may exercise such power, judicial in nature, in a distinctly unjudicial manner. The statute gives 'grandfather rights' to an applicant 'if any such carrier or predecessor in interest was

in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935, * * * and has so operated since that time.' *More than five years after the 'grandfather' date* the Commission ruled that, *because for a period of four months* (February-June, 1937), the first of *applicant's* two predecessors in interest *did not, in the opinion of the Commission, maintain his status as a common carrier,* applicant was not entitled to a permit. In arriving at its decision, *the Commission said it need not,* and therefore did not, *give any consideration to the carriers' operations either before or after the named period in* 1937.

"*Whether an applicant,* and his predecessors have *maintained bona fide status* as a common carrier *over a period of time is not to be determined by finding a flaw in the chain of operating title and then stopping there. Neither a title examiner nor a court in passing on title to real property would stop at a single flaw,* and say, as the Commission said here, *we need look no farther, we adjudge the title bad,* what has gone before or after is of no consequence. On the contrary, a defect in chain of title to real property would be appraised in its whole setting. So here, *the claim of right to a permit* under the Motor Carrier Act *should have been determined on the basis of the full five years operation,* not solely on the basis of a selected few months. Analogies in the law could be multiplied where determination of status is involved. I would not expect any Court in assessing conduct to hold that, because a suitor had done a particular thing that was bad, he was not entitled to have the good in his conduct considered and balanced against the bad.

"*The Motor Carrier Act,* as I said in *United States v. Maher,* 23 F. Supp., 810, 818, 307 U. S.

148, *affects the welfare of many small operators and should not be interpreted so strictly that slight deviation from perfect conduct works a loss of status.*

"I feel that *the case should be remanded* to the Commission *for consideration of the full time of operation in determining whether there was bona fide common carrier operation subsequent to the grandfather date and to the date of the hearing.*"

We admit that this is a dissenting opinion, but it is respectfully submitted that it represents good law. If it does, then by the same token appellant is likewise entitled to such a sound and fair appraisal by the Commission of his right to continue operations as a motor carrier under the provisions of the "grandfather" clause.

II. The Fact That Appellant in His Complaint Sought Primary Relief Against the Denial of Common Carrier Rights Is Without Legal Significance.

The government in its brief, in the trial court, and presumably here, will stress the fact that appellant originally emphasized the denial of rights as a common carrier and now seeks here in the alternative the restoration of rights as a contract carrier or as a common carrier. We have previously alluded to this matter at note 5 of our brief. Appellant has been engaged in motor vehicle operations since 1935. Cases previously cited indicate that there is frequently grave

doubt as to whether a particular operation falls within the general definition of a "common carrier" or of a "contract carrier" as contained in the Motor Carrier Act. Many cases have involved construction of this matter. All of these cases have cumulatively developed since passage of the Motor Carrier Act. Appellant continued to do in the years subsequent to the Motor Carrier Act that which he had done prior to the enactment of the Act. In the order of October 16, 1937 (R. 26) the Commission affirmed its conclusion that he was a common carrier. Appellant has thereafter continued operations as a common carrier. We believe that he is a common carrier and is as such entitled to rights.

However, that is a conclusion of law upon which this Court is the final arbiter. Many references have been made to the *Rosenblum* case. There on somewhat similar facts it was found that the applicant was a "contract carrier." In both cases the motor carrier sought, in the alternative, rights as a common carrier or as a contract carrier. But the Commission elected to treat his application as that of a contract carrier.

The *Rosenblum* case was decided in Missouri on January 14, 1941, after the filing of the instant complaint in Washington on January 8, 1941. Now obviously the law is a progressive thing. Clearly, the

theory of the Court below in the *Rosenblum* case was somewhat different from a part of the theory originally advanced by appellant in this case. However, that slightly different theory should not operate to preclude appellant from such relief as he is genuinely entitled.

The last paragraph of appellant's complaint was a typical general prayer, seeking "such other and further relief as the nature of the case shall require and to this Court shall seem meet." That "prayer for general relief" at the end of the complaint "upon a somewhat different theory from that which is advanced under one of the special prayers" is sufficient grounds for sustaining the complaint. *Lockhart v. Leeds,* and cases cited, *supra,* Note 5. The *Liquid Carbonic* case, *supra,* cites other Supreme Court cases affirming the fact that "the rule is now general that at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he has prayed for it or not." *Bemis Brothers Bag Co. v. United States,* 289 U. S. 28, 33-5.

If, therefore, this Court shall conclude on the facts that appellant is, as a matter of law, entitled to a contract carrier permit rather than the alternative prayer for a common carrier certificate, then such rights

should be granted to Lubetich pursuant to the general prayer.

III. The Granting of Rights Prayed Conforms to Congressional Intent and Will Not Cause Administrative Difficulty.

It may be presumed that appellees will urge here that if Lubetich's application is granted it will create "chaos" in administration of the Motor Carrier Act because there may be others who are similarly situated. This need not be. Obviously, the Interstate Commerce Commission had initially a problem of statutory construction. It had before it thousands of applications for motor carrier rights. 1938 *Annual Report, Interstate Commerce Commission* p. 82-3. To the best of its ability it sought to determine the rights accruing to each applicant fairly. Any aggrieved applicant had the opportunity to seek judicial review. Very few did seek judicial review. Many of these whose rights were denied have since retired from business.

There is neither economic nor legal justification for advancing the theory that to grant rights to Lubetich would result in reopening all of those prior cases.

This Court has had frequent recent occasion to consider the extent to which a new ruling by a court has

retroactive as well as prospective effect. The matter has been carefully considered by courts and by writers. See 24 Journal of the American Judicature Society 186; von Moschzisker *"Stare Decisis in Courts of Last Resort,"* 37 Harvard Law Review 407, 426; and 25 Journal of the American Judicature Society 55-6. In the last article the author said:

> "In the April, 1941, issue of the Journal (24:186), the Honorable Fred T. Hanson comments with logic and force that general employment by appellate courts of the admonitory technique in opinion writing—consisting in denial of retroactive effect to an overruling decision—well may discourage prosecution of appeals, with the undesirable consequence of denial to appellate courts of opportunity to correct erroneous lines of decision. In 1924 the same point was made with no less vigor by the Honorable Robert von Moschzisker in 'Stare Decisis in Courts of Last Resort,' 37 Harvard Law Review 409, 426, where, urging that the admonitory technique would prove nonutile, he wrote:
>
> > 'Such a method . . . must prove quite ineffective as a practical remedy, since parties would, in all probability, be unwilling to attack by litigation points already settled, when a new ruling would alter the law only prospectively, and could not be applied to their dispute.'
>
> "A solution to the mentioned problem has been provided, however, by the Courts of Missouri and Kentucky, in *Barker v. St. Louis County* (Mo.) 104 S.W. (2d) 371 (1937), and *Eagle v. City of Corbin,* 275 Ky. 808, 122 S.W. (2d) 798 (1938), in each of which cases ***the overruling decision was de-declared to have prospective effect only, except with***

respect to the appellants before the courts in those particular appeals, who were given the benefit of retroactive operation of the newly announced rule and were awarded reversals of the judgments below. *The Missouri Court expressly justified the award of retroactive operation to the appellant, Barker, on the ground that he had borne the burden of securing correction of the erroneous rule theretofore prevailing.*

"The solution provided by the cited cases admittedly is novel and somewhat of a compromise, but it also would seem to be fair, practical and useful, and if such is the case, it has much to commend it."

This doctrine is both fair and sound. Applying it to the instant case it would mean that a certificate, or in the alternative, a permit would issue to Lubetich. Similar relief would be granted to the other litigants before the Court, Rosenblum and Margolies. The case would, of course, serve as a precedent having prospective application to future determination by the Interstate Commerce Commission, but it would not have retroactive application except to the extent of other litigation now in progress involving the correct application of this principle.

The application of such a principle achieves even-handed justice to the litigants here. It overcomes any contention by the government that the Commission should be sustained merely because it might make easier administration. Compare *Atchison T. & S. F. Ry. Co. v. United States,* 284 U. S. 248, 262; 52 Sup. Ct. 146, 150 (1932).

Finally, it may be argued that if applicant should prevail here as a *contract* carrier under the grandfather clause, and continue his present separately authorized operations as a common carrier under his "B.M.C. 8" proof of public convenience, that such a situation would create "dual" operation as a common and contract carrier. Section 210 prohibits such operations unless the Commission finds it to be "consistent with the public interest." There are, however, at least two answers: (a) offer proof of such consistency; or (b) surrender the alternative rights. Compare *Cole Teaming Co.*, — M.C.C. —, decided Sept. 19, 1941, 2 Fed. Car. Cases, par. 7855 (C.C.H.) Such a bridge should be appropriately crossed when reached.

CONCLUSION

It is respectfully submitted that the decree below should be reversed and the order of the Commission set aside.

Respectfully submitted,

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